

CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D.C. 20505

OGC Has Reviewed

OGC 79-04723

18 May 1979

Bernhardt K. Wruble, Esq.  
Director, Office of Government Ethics  
Office of Personnel Management  
Washington, D.C. 20415

Dear Mr. Wruble:

This letter transmits CIA comments, enclosed, on the interim regulation on postemployment restrictions established by title V of the Ethics in Government Act of 1978. While these comments recommend clarification or minor revision for certain provisions in the regulation, some of our concerns might best be dealt with by means of an OPM notice or opinion. I must commend you and your staff for a particularly fine job in providing useful guidance in this very complex area.

Included in these comments also is our response as to your request for the designation of Senior Employees. As you will note, we are concerned with the security ramifications involved in providing the information precisely as you have requested. Moreover, we are somewhat unclear as to your understanding of the categories of personnel that should be designated. We wish to cooperate to the fullest extent practicable, but believe the security sensitivities involved make it imperative that we proceed cautiously.

Accordingly, we believe it would be fruitful to arrange a meeting at your convenience to discuss Agency concerns and OGE expectations. We believe that a reasonable accommodation can be reached which will meet the requirements of the ethics law and the security responsibilities of the Director of Central Intelligence under the National Security Act. Please do not hesitate to contact me if you have any questions or comments.

Yours truly,

[Redacted Signature Box]

ST

OGC:WGJ:njp

Distribution:

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1 - OGC Subj: Conflicts of Interests

1 - Chrono

1 - WGJ Signer

OFFICE OF PERSONNEL MANAGEMENT

POST EMPLOYMENT CONFLICT OF INTEREST

5 CFR 737

The following are comments on the interim OPM regulations pertaining to conflicts of interests:

Section 737.1(c)(6)

-1. The regulations provide that agencies have the primary responsibility for the enforcement of the post-employment restrictions and that criminal action may be taken in some cases. Also, the OPM summary provides that each agency is responsible for providing prompt advice to former employees so as to avoid violations. Of course we recognize that agencies of former officials are in the best position to spot likely conflicts when such officials represent others on matters involving the Government; however, a charge to advise former employees, or current employees with retirement plans, places Government agencies--and its attorneys, in particular--in a rather awkward situation. On the one hand we encourage those employees to provide a full and detailed account of their plans; on the other hand, in rendering such advice there can be no attorney-client relationship, and we must report actual and potential violations of law to the Department of Justice. 18 U.S.C. § 535; Executive Order 12036, Section 1-706. Agencies, moreover, that provide incorrect advice may be subjecting former employees to possible prosecution if they rely upon it. For this reason in the past we have encouraged requesters to seek private counsel or to contact the Department of Justice on all but the most obvious cases. We believe it would be useful for the regulations to address this situation briefly; alternatively, an OPM notice could be issued.

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Section 737.3(a)(5)

3. We believe the regulations would be more helpful if they made it clear that independent contractors are never special government employees. While this may be obvious to some, confusing guidance in the past has left us in doubt as to the status of certain consultants and advisers whom we would hesitate to attempt to treat as employees only for purposes of the conflicts of interests laws. Perhaps the regulations could provide one or two examples of the type of consultant or advisory panel member that would be considered an employee.

Section 737.5(c)(2)

4. The regulations provide two examples relating to technical work. Query whether the result of example 1 would change if the former employee, who participated significantly in formulating the mission need of a project, accepts a position with Z Company (instead of Q) to represent Z in seeking a bid to manufacture one of the systems it proposed? Additionally, noting example 2, may a former employee represent any company seeking the award of a project for which the employee substantially participated in formulating the mission need? That is, could the employee represent Z in seeking the award of the contract on alternative approaches? Finally, although a satellite contract (example 2) would not become a matter involving a specific party until initial proposals are first received from contractors, does the submission of any contractor trigger the statute, or may the employee represent the company so long as that particular contractor has not yet submitted a bid? That is, if Mr. A works on a design and on formulating mission needs, and the "rfp" goes out, may he represent C Company in submitting a bid if Z Company has already submitted one?

Section 737.9(h)

5. We presume that, upon passage of the amendments, the examples at (h), particularly numbers 1 and 2, will be replaced to reflect the amendment as to representation "by personal presence at" an appearance.

Section 737.21

6. The regulation, as well as the statute, addressing the partners of current employees is somewhat confusing. The regulation provides that activities of current employees and their partners are beyond the scope of the regulations; yet, that is all the statute addresses. If OPM intends to issue additional regulations that would implement 18 U.S.C. § 207(g), it would be useful to refer to that here.

Section 737.25

7. Our most serious concern with the interim regulations involves the designation of "Senior Employees." As you are aware, this Agency is exempt from the Classification Act; accordingly, our employees, although paid on our own "GS" equivalent, are paid under a system other than the General Schedule. Moreover, our personnel do not hold positions in the same sense that a competitive service civil servant holds a position. Instead, rank or grade is in the individual. FOIAE  
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Nevertheless, we believe a reasonable accommodation can be reached. The regulation provides that exemptions may be available for officials without significant decision-making authority regularly extending to major policy issues or supervisory responsibility extending to less than all of a directorate, bureau, or department that has major policy or operational responsibility. This Agency is comprised of major components called Independent Offices and Directorates (see attachment at lines 3 and 4), each with its own internal Offices or Divisions (partial listing at line 5). The Offices of the Operations Directorate are not indicated for security reasons.

9. The Heads of Independent Offices and Deputy Directors, as the heads of these major components are called, report

directly to the Director of Central Intelligence. It may be appropriate to compare some of these officials with officials of Assistant Secretary rank in the various executive departments. These officials formulate Agency policy for DCI approval and serve, in effect, as his staff.

10. Within these Directorates and Independent Offices are numerous Offices and Divisions, headed by directors who implement Agency policy by supervising, directing, or managing the actions of their respective divisions or branches. Their decision-making responsibilities, it should be noted, are generally more limited in that matters that have no precedence or that have policy or resource implications generally are referred to office directors and forwarded to Deputy Directors and Heads of Independent Offices for resolution.

11. In view of these considerations, we propose to exempt all officials except the following: the Director of Central Intelligence; Deputy Director of Central Intelligence; Deputy Directors and Heads of Independent Offices, and their deputies; Office directors, and their deputies. These officials alone seem to have regular decision-making responsibilities as contemplated under the regulations. While other Agency officials certainly make significant decisions regarding the work that they do, those decisions do not regularly, if at all, involve policy decisions of significance. Rather, they are more likely to involve implementation of existing Agency policy. The types of officials exempted include: special assistants, intelligence analysts, inspectors, personnel and training officers, accountants, security officers, chiefs of station, and contract officers. We would appreciate your views on our approach.

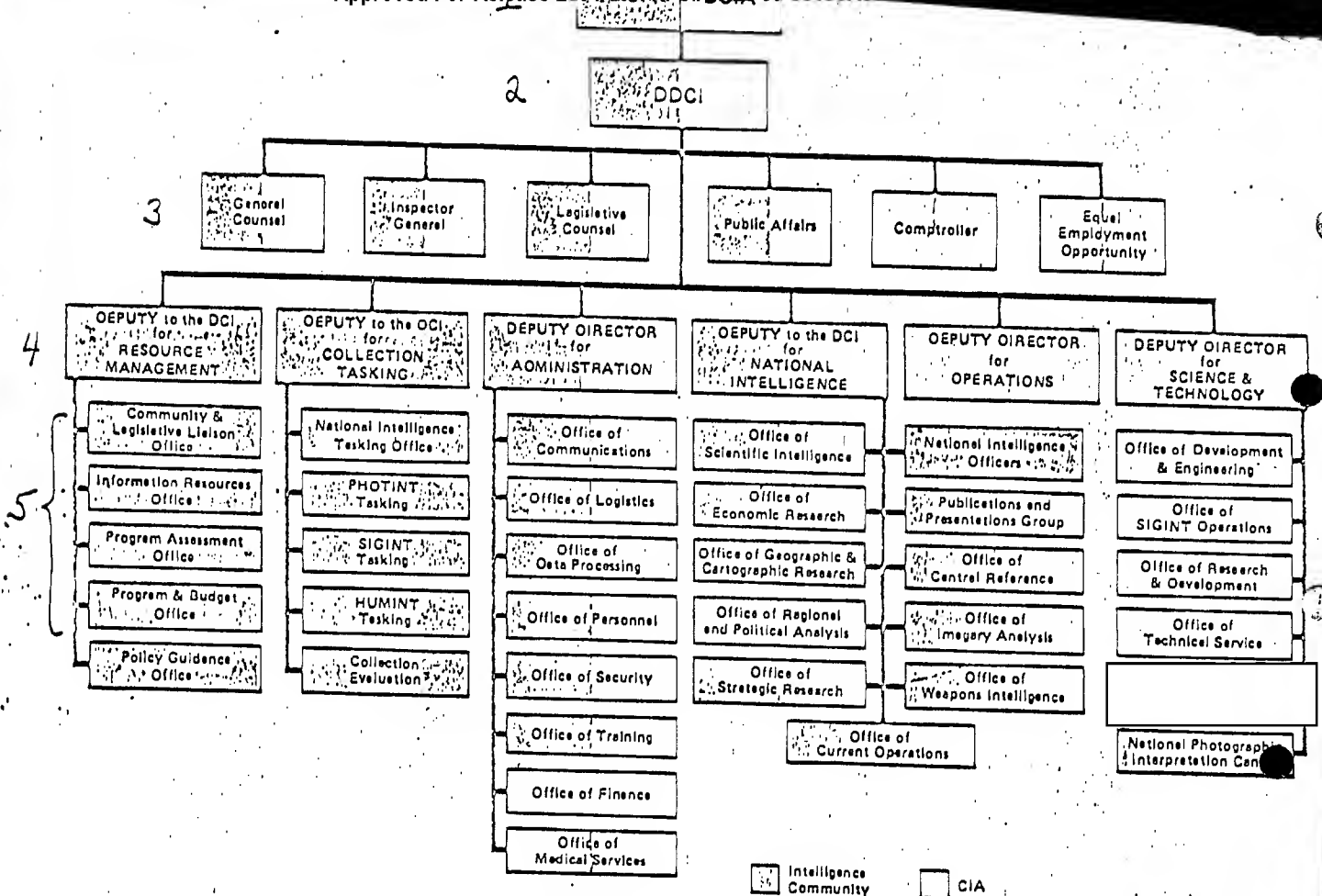
#### Section 737.25(g)

12. In the same vein, we would expect that exempted Agency positions not be published in the Federal Register. We do not object to publication of information from the attached list, although we would probably have to provide you with more precise job titles for the affected individuals.

#### Section 737.25(i)

13. We also wish to express our concern with the requirement that position shifting be reported, not only for the security reasons already discussed, but also because we find it overly intrusive and likely to bring undue attention or criticism to government employees. We question reporting the identities of individuals moving into exempted positions

when as a rule the regulations do not require that the designated individuals be identified. While we recognize that the requirement indicates an effort to preclude officials from transferring to an exempted position to avoid being designated under the law, we believe reporting positions or job titles would be more appropriate and consistent with the remainder of the regulation. Of course, our previous comments as to reporting identities and positions also apply.



January 1979